

CHAPTER 13

ADMINISTRATIVE INVESTIGATIONS

Almost every LN will have contact with an administrative fact-finding body, commonly called a JAGMAN investigation. The regulations that govern these investigations are contained in the *Manual of the Judge Advocate General* (JAGMAN) and JAGINST 5830.1. The primary purpose of an administrative fact-finding body is to provide the convening authority (CA) and reviewing authorities with adequate information upon which to base decisions. In so providing the CA, an administrative fact-finding body searches out, develops, assembles, analyzes, and records all available information about the matter under investigation. As the name indicates, these investigations are purely administrative in nature—not judicial. The investigation is advisory only; the opinions are not final determinations or legal judgments, nor are the recommendations made by the investigating officer (IO) binding upon the convening or reviewing authorities.

TYPES OF INVESTIGATIONS

There are three types of administrative fact-finding bodies (courts of inquiry, fact-finding bodies required to conduct a hearing, and fact-finding bodies not required to conduct a hearing); however, for purposes of procedures, there are only two types of fact-finding bodies.

1. Fact-finding bodies required to conduct a hearing. These include courts of inquiry and investigations required to conduct a hearing. A court of inquiry consists of at least three commissioned officers and appointed legal counsel for the court. It is convened by written appointing order, takes all testimony under oath, and records all proceedings verbatim. A court of inquiry has the power to subpoena civilian witnesses. A fact-finding body required to conduct a hearing consists of one or more commissioned officers and should have appointed legal counsel for the proceedings. It is convened by a written appointing order. The appointing order should direct that all testimony be taken under oath and/or all proceedings recorded verbatim. A collateral function of a court of inquiry and a fact-finding body required to conduct a hearing is to provide a hearing to individuals who have been designated as parties to the investigation.

2. Fact-finding bodies not required to conduct a hearing. This category includes only the investigation not requiring a hearing. It is normally composed of a single investigator who obtains statements, rather than taking testimony, and who is not authorized to designate parties.

The importance of an administrative fact-finding body cannot be stressed enough. It is not only an efficient management tool, but also can be used in a wide variety of situations ranging from the proper disposition of claims to the timely and accurate reply to public inquiry. Various directives establish requirements for conducting of inquiries into specific matters. The JAGMAN, however, is the most inclusive. Some incidents involve conducting an inquiry for several different purposes that can be handled by one investigation; others may not. A CA must be careful to determine why an investigation is being conducted, who is supposed to conduct it, and whether it will satisfy all requirements or only a portion of them. The following situations are examples of the various different types of investigations:

- Aircraft accidents
- Vehicle accidents
- Explosions
- Stranding of a ship of the Navy
- Collisions
- Accidental or intentional flooding of a ship
- Fires
- Loss or excess of government funds or property
- Claims for or against the government
- Reservists (an investigation is required if a reservist is injured or killed while performing active duty or training for 30 days or less, or inactive-duty training)
- Admiralty matters
- Firearm accidents
- Pollution incidents

- Combined investigations of maritime incidents
- Security violations
- Postal violations
- Injuries and diseases incurred by service members
- Quality of medical care reasonably in issue
- Redress of damage to property
- Death cases

DEATH CASES

A fact-finding body must be convened in the following death cases: (1) when the death of a member of the naval service occurred, while on active duty, from other than a previously known medical condition; (2) when civilians or other nonnaval personnel are found dead on a naval installation under peculiar or doubtful circumstances, unless the incident is one that the Naval Criminal Investigative Service (NCIS) has exclusive jurisdiction; and (3) when death, or permanent disability, in which the adequacy of medical care is reasonably in issue.

You do not have to send a report to the Judge Advocate General (JAG) when death occurs as a result of enemy action. A fact-finding body should be convened and the record forwarded in any case when it is unclear if enemy action caused the death. Because some commercial life insurance policies contain certain restrictions and/or certain types of double-indemnity provisions, it is desirable to make sure the essential facts are recorded while witnesses are known and available. When feasible, the facts reported should permit determinations as to whether death resulted from accidental causes, natural causes, or enemy action.

Progress status reports are required on all death investigations from all command and reviewing activities every 14 days. Send a message to the Chief of Naval Personnel, with JAG and all intermediate commands/reviewing authorities as information addressees. The requirement for the status report ceases once the investigation has been sent to the next higher level of command/reviewing authority.

Advise the next of kin that they may request copies of the death investigation from JAG (Code 33). It is most important, therefore, that mature, experienced officers complete these investigations in an accurate, professional, and expeditious manner. Send an advance copy of each death investigation, with the GCM CA's

endorsement, to JAG. If it would unduly delay submission of the investigation to await a final autopsy report, autopsy protocols, death certificates, or similar documents, submit an initial report promptly upon completion of the investigation. Submit a supplemental report via the review chain, with an advance copy to JAG, once the autopsy has been completed. The advance report is usually released to the requesting next of kin by JAG (after exclusion of material protected by the exemptions to the Freedom of Information/Privacy Act), unless JAG has been alerted that subsequent reviewers may significantly alter findings, opinions, or recommendations; in which case, release is withheld until the investigative report is finally reviewed.

INVESTIGATIONS REQUIRED BY OTHER REGULATIONS

If an investigation is required under the JAGMAN, it must be conducted in addition to any other investigation required by other regulations. Situations in which two investigations may be required are listed in JAGMAN § 0208a.

A JAGMAN investigation is not required if there is no reason for the investigation other than possible disciplinary action. To avoid interference, a JAGMAN investigation should not normally proceed at the same time as a law-enforcement type of investigation by the Federal Bureau of Investigations (FBI), NCIS, or local civilian law-enforcement units.

If an investigation is required for other than disciplinary action, the IO should communicate with the law-enforcement personnel, explaining the need for the JAGMAN investigation, and request that the police investigators keep him or her informed of what information is obtained.

Other types of investigations that have additional instructions and guidance include the following:

- Safety investigations—OPNAVINST 5100.14
- Aircraft accident reports and aircraft mishap investigations—OPNAVINST 3750.6
- Accidental inquiry to personnel—OPNAVINST 5100.12
- Admiralty—JAGINST 5880.1
- Felonies involving both naval and civilian personnel—SECNAVINST 5820.1

- Crimes involving exclusive NCIS jurisdiction—SECNAVINST 5520.3 and OPNAVINST 5450.97
- Security violations—OPNAVINST 5510.1
- Stolen government property—SECNAVINST 5500.4
- Claims for or against the government—JAGINST 5830.1
- Postal violations—OPNAVINST 5112.6

INVESTIGATIONS NOT REQUIRING A HEARING

The type of fact-finding body to be convened is determined by the purpose(s) of the inquiry, the seriousness of the issues involved, the time allotted for completion of the investigation, and the nature and extent of the powers required to conduct a thorough investigation. This section will concentrate on the most common administrative fact-finding body, the investigation not requiring a hearing. Courts of inquiry and investigations requiring a hearing will be discussed later in this chapter. Keep in mind, however, that many of the basic rules and principles discussed in this section also apply to other types of investigations. As is the case with any fact-finding body, the primary function of an investigation not requiring a hearing is to gather information. A fact-finding body not requiring a hearing does not have the power to designate parties and, therefore, does not have the collateral function of providing a hearing to a party.

Any officer in command may order an investigation not requiring a hearing. For purposes of the JAGMAN, officer in command means an officer authorized to convene any type of court-martial or authorized to impose disciplinary punishment under Article 15, *Uniform Code of Military Justice* (UCMJ). This also includes officers in charge (OICs).

An officer in command is responsible for initiating investigations of incidents occurring within his or her command or involving his or her personnel. If an officer in command feels that investigation of an incident by the command is impractical, another command can be requested to conduct the investigation.

If an incident requiring the convening of an investigation occurs at a place geographically distant from the command, or the command deploys before an investigation can be completed, another command can be requested to conduct the investigation. This request

should be made to the area coordinator in whose geographical area of responsibility the incident occurred.

A single investigation should be conducted into an incident involving more than one command, convened by an officer in command of any of the activities involved. If difficulties arise concerning who should convene the investigation, the common superior of all commands involved will determine who will convene it. If the conduct or performance of one of the officers in command may be subject to inquiry (as in the case of a collision between ships), the common superior of all the officers involved will convene the investigation.

THE INVESTIGATORY BODY

An investigation not requiring a hearing may be composed of a single investigator or a board consisting of two or more members. The most common is the one-officer investigation. The IO should normally be a commissioned officer, but may be a warrant officer, senior enlisted, or a civilian employee, when appropriate. IOs must be those individuals who are best qualified for the duty by reason of age, education, training, experience, length of service, and temperament. Unless impractical, the IO should be senior to any person whose conduct or performance of duty will be subject to inquiry. An expert may participate as IO or for the limited purpose of using his or her special experience. The report should make clear any participation by an expert. Ordinarily, counsel is not appointed for an investigation not requiring a hearing, although a judge advocate is often made available to help the IO with any legal problems or questions that may arise.

APPOINTING ORDER

An investigation not requiring a hearing is convened by a written order called an appointing order. An officer in command is responsible for initiating investigations of incidents occurring within his or her command or involving his or her personnel.

An appointing order must be in official letter form, addressed to the IO of the one-officer investigation. When circumstances warrant, an investigation may be convened by an oral or message order. The IO must include the signed, written confirmation of oral or message orders in the investigative report.

The written appointing order for a JAGMAN investigation not requiring a hearing will contain the following:

1. Subject line (fig. 13-1)

2. Witness warnings, purpose, and scope of the investigation (fig. 13-2)

The paragraphs in figure 13-2 serve several purposes. They recite the specific purpose(s) of the investigation, give explicit instructions as to the scope of the inquiry, and direct the IO to the required witness warnings.

These instructions help the IO accomplish all the objects of the investigation, not just the CA's immediate objectives. For example, the following case of a vehicle accident involving a member of the naval service may give rise to various concerns that include (1) the CA who orders the investigation may be concerned whether local procedures regarding the use of government vehicles should be changed and whether disciplinary action may be warranted; (2) JAG may be concerned with a line of duty/misconduct determination; and (3) the cognizant naval legal service office (NLSO) claims officer will be concerned with potential claims for or against the government. A properly completed investigation requires the IO to satisfy the special requirements for each of these different determinations.

All fact-finding bodies are required, as directed in paragraph 2 of figure 13-2, to make findings of fact. In the typical investigation not requiring a hearing, the appointing order directs the IO to conduct a thorough investigation into all the circumstances connected with the subject incident and to report findings of facts, opinions, and recommendations concerning the following:

- The resulting damage
- The injuries to members of the naval service and their line of duty and misconduct status
- The circumstances attending the death of members of the naval service
- The responsibility for the incident under investigation, including any recommended administrative or disciplinary action
- Claims for and against the government
- Any other specific investigative requirements that are relevant, such as those contained in the JAGMAN

During the course of the investigation, on advice of the investigative body or on his or her own initiative, the

Subj: INVESTIGATION TO INQUIRE INTO THE CIRCUMSTANCES SURROUNDING THE MOTOR VEHICLE ACCIDENT INVOLVING, AND INJURIES SUSTAINED BY YNSN JOHN A. DOE, USN, 111-11-1111, NAVAL AIR STATION, PENSACOLA, FLORIDA, WHICH OCCURRED IN PENSACOLA, FLORIDA, ON 17 JULY 1994

Figure 13-1.—Sample subject line for JAGMAN investigation.

Ref: (a) Oral appointing order at 0500 hours, 17 July 1994
(b) JAG Manual

1. Pursuant to reference (a), and under Chapter II, Part B, of reference (b), you are appointed to inquire, as soon as practical, into the circumstances surrounding the motor vehicle accident and injuries sustained by YNSN John A. Doe, which occurred in Pensacola, Florida, on 17 July 1994.
2. You are to investigate all facts and circumstances surrounding the motor vehicle accident that occurred at Pensacola, Florida on 17 July 1994. You must investigate the cause of the motor vehicle accident, resulting injuries and damages, potential claims for or against the government, and any fault, neglect, or responsibility therefore. You must express your opinion of the line of duty and misconduct status of any injured naval member. You should recommend appropriate administrative or disciplinary action. Report your findings of fact, opinions, and recommendations by 16 August 1994, unless an extension of time is granted. In particular, your attention is directed to sections 0202e, 0213 0215b, 0227a, 0229, 0803-0804, and appendix A-2-e of reference (b).

Figure 13-2.-Sample witness warnings, purpose, and scope of investigation.

CA may broaden or narrow the scope of the inquiry by issuing supplemental directions amending the appointing order.

Paragraph 2 of figure 13-2 also directs the IO to report opinions and recommendations. Unless specifically directed by the appointing order, opinions or recommendations are not made. The CA may require recommendations in general, or in limited subject areas.

The appointing order may direct that testimony or statements of some or all witnesses be taken under oath and may direct that testimony of some or all witnesses be recorded verbatim. When a fact-finding body not requiring a hearing takes testimony or statements of witnesses under oath, it should use the oaths prescribed in JAGMAN 0212b.

The Privacy Act requires that a Privacy Act statement be given to anyone who is requested to supply personal information in the course of a JAGMAN investigation when that information will be included in a system of records. Note that witnesses will rarely provide personal information that will be retrievable by a witness' name or other personal identifier. Since such retrievability is the cornerstone of the definition of system of records, in most cases the Privacy Act will not require warning anyone unless the investigation may eventually be filed under that individual's name.

Social security numbers should not be included in JAGMAN investigation reports unless they are necessary to precisely identify the individuals involved, such as in death or serious injury cases. If a service member or civilian employee is asked to voluntarily provide their social security number for the investigation, a Privacy Act statement must be provided. If the number is obtained from other sources, the individual does not need to be provided with a Privacy Act statement. The fact that social security numbers were obtained from other sources should be noted in the preliminary statement of the investigation.

If prosecution for a suspected offense under the UCMJ appears likely, the witness suspected of the offense should be warned under Article 31(b), UCMJ,

and JAGMAN 0170. Appendix A-1-m of the JAGMAN shows the proper form to be used. The IO should collect all relevant information from all sources—other than from those persons suspected of offenses, misconduct, or improper performance of duty—before interviewing the suspect.

A member of the armed forces, before being asked to provide any statement relating to the origin, incurrence, or aggravation of any disease or injury suffered, should be advised of the statutory right not to make such a statement. Appendix A-2-f of the JAGMAN contains a proper warning format and without this warning the statements are invalid.

As figure 13-2 illustrates, all sections of the JAGMAN that may apply to the particular incident under investigation should be listed, along with any applicable chain of command directives.

Paragraph 2 of figure 13-2 directs completion of the IO's report within 30 days of the date of the appointing order. JAGMAN 0202c established the following time limits for processing JAGMAN investigations:

(a) The CA prescribes the time limit the fact-finding body has to submit its investigation. This period should not normally exceed 30 days from the date of the appointing order; however, this period may be extended for good cause. Always include requests and authorizations for extension as enclosures to the investigation.

(b) The CA and each subsequent reviewer have 30 days (20 days in death cases) to review the investigation. Reasons for exceeding these time limits must be documented by the responsible endorser, and deviations must be requested and approved in advance by the immediate senior in command who will next review the investigation.

3. Attorney work product statement (fig. 13-3)

Figure 13-3 is an attorney work product statement. This language must be included in the appointing order if the possibility of litigation or a claim for or against the government exists.

3. This investigation is appointed in contemplation of litigation and for the express purpose of assisting attorneys representing interests of the United States in this matter. You will contact LCDR Mary N. Christmas, JAGC, USN, for direction and guidance as to those matters pertinent to the anticipated litigation.

Figure 13-3.—Attorney work product statement.

4. Administrative support (fig. 13-4)

Figure 13-4 directs the SJA office of the command to provide clerical support to the IO. It is extremely important to designate who provides that support in order for the IO to obtain assistance in typing the investigation and producing the necessary number of copies.

THE INVESTIGATION

Upon first appointment as an IO, the universal question is, "Where do I begin?" The first step is to examine the appointing order to determine the specific purpose and scope of the inquiry, remembering that the general goal is to find out who, what, when, where, how, and why an incident occurred. Next, the IO should decide exactly which procedures to follow and become fully acquainted with part A of chapter II and the specific sections of the JAGMAN listed in the appointing order. Most importantly the IO should begin work on the investigation immediately upon notification of appointment, whether or not a formal appointing order has been received. The investigation should start as soon as possible after the incident has occurred, since:

- witnesses may be required to leave the scene;
- a ship's operating schedule may require leaving the area of the incident;
- events will be fresh in the minds of witnesses; and
- damaged equipment/material are more apt to be in the same relative position/condition as a result of the incident.

The circumstances surrounding the particular incident under investigation will dictate the most effective method of conducting the investigation. For example, an investigation of an automobile accident, in which one or more of the parties were injured, would involve (1) interviews at the hospital with the injured parties; (2) collection of hospital records and police

reports; (3) eyewitness accounts; (4) vehicle damage estimates; (5) mechanical evaluation; (6) inspection of the scene; and (7) other matters required by JAGMAN, sections 0215-0224, 0227, 0229, and 0231. On the other hand, an investigation of a shipboard casualty or the loss of a piece of equipment could involve merely the calling and examination of material witnesses.

The IO may use any method of investigation he or she finds most efficient and effective. Relevant information may be obtained from witnesses by personal interview, correspondence, telephone inquiry, or other means. One of the principal advantages of an investigation not requiring a hearing is that the interviewing of witnesses maybe done at different times and places, rather than at a formal hearing.

The IO is not bound by formal rules of evidence and may collect, consider, and include in the record any matter relevant to the inquiry that a person of average caution would consider to be believable or authentic. The IO must authenticate real and documentary items and enclose legible reproductions in the investigative report, with certification of correctness of copies or statements of authenticity. The IO may not speculate on the causes of an incident; however, inferences may be drawn from the evidence gathered to determine the likely course of conductor chain of events that occurred. In most cases, it is inappropriate for the IO to speculate on the thought process of an individual that resulted in a certain course of conduct.

As stated previously, the IO is not bound by the formal rules of evidence; however, there are certain things that cannot be combined with an investigative report.

NCIS investigations. An NCIS investigation consists of a narrative summary portion (called the Report of Investigation, where the participating agents detail the steps taken in the investigation) and enclosures. The IO is forbidden from including the narrative summary portion of the NCIS investigation in the JAGMAN investigation; however, the enclosures, which frequently comprise the bulk of an NCIS

4. By copy of this appointing order the Staff Judge Advocate's Office, Naval Air Station, Pensacola, Florida, is directed to furnish any necessary clerical assistance for recording the proceedings and preparing the record. Social security numbers of military personnel should be obtained through PSD or other official channels.

Figure 13-4. Administrative support statement.

investigation, can be used. The JAGMAN investigation should not interfere with the completion of the NCIS investigation; therefore, it is advisable that the IO wait until NCIS completes its investigation before obtaining a copy for use of the statements gathered by NCIS.

Aircraft mishap investigative report. Aircraft accidents are investigated by one or more investigative bodies under existing instructions and legal requirements. For the sole purpose of safety and accident prevention, the Chief of Naval Operations (CNO) issues special instructions for the conduct, analysis, and review of investigations of aircraft mishaps. These investigations are known as Aircraft Mishap Investigation Reports (AMIRs). Because these investigations are directed toward safety problems, confidentiality is essential in order to allow personnel to be honest when giving statements. Therefore, a statement obtained in an AMIR is not available to the IO from any official source. IOs from both the aircraft safety investigation and the JAGMAN investigation, however, should have equal access to all real evidence and have separate opportunities to question and obtain statements from all witnesses.

Other mishap investigation reports. For the reasons specified previously, these mishap investigation reports cannot be included in JAGMAN investigations.

Inspector General reports. These reports cannot be included in JAGMAN investigations.

Polygraph examinations. Neither polygraph reports nor their results should be included in the JAGMAN investigative report; however, if essential for a complete understanding of the incident, the location of the polygraph report should be cross-referenced in the report.

Medical quality assurance investigations. A naval hospital will conduct its own investigation (much the same as the AMIR). Confidentiality is essential here also. Therefore, statements obtained in a medical quality assurance investigation cannot be used in a JAGMAN investigation.

Photographs, records, operating logs, pertinent directives, watchlists, and pieces of damaged equipment are examples of evidence that the IO may have to identify, accumulate, and evaluate. To the extent consistent with mission requirements, the CA will make sure all evidence is properly preserved and safeguarded until the investigation is complete and all relevant actions have been taken.

Photographs and videotapes that have sufficient clarity to depict actual conditions are invaluable as evidence. Although, in some instances, color photos present the best pictorial description, they are more difficult to reproduce and normally require more time to develop; therefore, it may be more prudent to use black and white film. Polaroid prints offer instant review to make sure the desired picture is obtained, but are somewhat difficult to reproduce or enlarge. Photographs and videos should be taken from two or more angles, using a scale or ruler to show dimensions. The investigative report should include the negative plus complete technical details relating to the camera used. In cases of personal injury or death, photographs and videos that portray the results of bodily injury should be included only if they contribute to the usefulness of the investigation. Lurid or morbid photographs and videos that serve no useful purpose should not be taken.

Sketches instead of or in conjunction with photographs or videos provide valuable additional information. Insignificant items can be omitted in sketching, providing a more uncluttered view of the scene. Where dimensions are critical but may be distorted by camera perspective, accurate sketches can be more valuable. Sketches should be drawn to scale, preferably on graph paper. They can also be used as a layout to orient numerous photos and measurements.

Carefully handle pieces or parts of equipment and material to make sure this physical evidence is not destroyed. If attaching real evidence to the report is inappropriate, preserve it in a safe place under proper chain of custody-reflecting its location in the report of investigation. Tag each item with a full description of its relationship to the accident. If it is to be sent to a laboratory for analysis, package it with care. Accompany the item(s) with a photo or sketch showing the "as found" location and condition.

Make verbatim copies of relevant operating logs, records, directives, memos, medical reports, police or shore patrol reports, motor vehicle accident reports, and other similar documents. To assure exactness, reproduce by mechanical or photographic means if at all possible. Check copies for clarity and legibility and examine closely for obvious erasures and markovers that might not show up when reproduced.

If the IO observes an item and gains relevant sense impressions (noise, texture, smells, or any other impression not adequately portrayed by photograph, sketch, or map), those impressions should be recorded and included as an enclosure to the report.

WITNESSES

The best method for examining a witness depends on the witness and the complexity of the incident. The most common method used by IOs is the informal interview. Whatever method is employed, however, the witness' statement should be reduced to writing and signed by the witness whenever possible. Sworn statements may be taken unless the appointing order directs otherwise. A sworn statement is considered more desirable than an unsworn statement since it adds to the reliability of the statement and can expedite subsequent action (such as pretrial investigations). The statement should be dated and should properly identify the person making the statement; for example, a service member by full name, grade, service, and duty station; a civilian by full name, title, business or profession, and residence. If necessary, the IO can certify that the statement is an accurate summary, or verbatim transcript, of oral statements made by the witness.

To make sure all relevant information is obtained when examining a witness, the IO should use the appointing order and the requirements in JAGMAN, chapter II, part B, Investigations of Specific Types of Incidents, as a checklist. In addition to covering the full scope of the investigation requirements, witness statements should be as factual in content as possible. Vague Opinions (such as pretty drunk a few beers, and pretty fast) are of little value to the reviewing authority who is trying to evaluate the record. The IO should be able to separate conclusions from observations; therefore, when a witness makes a vague statement, try to pin down the actual facts. For example, instead of accepting the witness' opinion that a person was pretty drunk, the IO should ask the kind of questions that go to supporting that kind of opinion. For example, (1) How long did you observe the person? (2) Describe the clarity of speech? (3) Did you observe him walk? (4) What was the condition of his eyes? (5) What was he drinking? (6) How much was he drinking? (7) Over what period of time?

In many instances, limitations on availability of witnesses will prevent the IO from obtaining a written, signed statement in the previous manner. When this happens, an IO may take testimony or collect evidence in any fair manner he or she chooses. Unavailable witnesses may be examined by mail or by telephone. If the telephone inquiry method is used, the IO should prepare a written memorandum of the call, identifying the person by name, rank armed force, and duty station (if a service member) or by name, address, and occupation (if a civilian). The memorandum should

state the substance of the conversation, the time and date it took place, and any rights or warnings provided.

COMMUNICATIONS WITH THE CA

If at any time during the investigation it should appear, from the evidence presented or otherwise, that the CA might consider it advisable to enlarge, restrict, or otherwise modify the scope of the inquiry or to change in any respect any instruction provided in the appointing order, an oral or written report should be made to the CA. The CA may take any such action on this report deemed necessary. There is no requirement that such communications with the CA be included in the report or the record of the investigation.

INVESTIGATIVE REPORT

The investigative report, submitted in letter form, consists of the following items:

- A preliminary statement
- Findings of fact
- Opinions
- Recommendations
- Enclosures

Preliminary Statement

The purpose of the preliminary statement is to inform the convening and reviewing authorities that all reasonably available evidence was collected and that the directives of the CA have been met. The preliminary statement should refer to the appointing order and set forth the following information:

- The nature of the investigation
- Any limited participation by a member and/or the name of any individual who assisted and the name and organization of any judge advocate general who assisted
- Any difficulties encountered in the investigation and the reasons for any delay
- If the evidence in the enclosures is in any way contradictory, a factual determination in the findings of fact section along with an explanation of the basis for that determination (this explanation should be reserved for material facts)
- Any failure to advise individuals of their rights

- The fact that all social security numbers were obtained from official sources

- An attorney work product statement when a claim, or litigation by or against the United States, is reasonably possible

- Any other information necessary for a complete understanding of the case

Do not include a synopsis of facts, recommendations, or opinions in the preliminary statement. These should appear in the pertinent sections of the investigative report. It is not necessary for the IO to provide an outline of the method used to obtain the evidence contained in the report. A preliminary statement does not eliminate the necessity for making findings of fact. Even though the subject line and preliminary statement may talk about the death of a person in a car accident, findings of fact must describe the car, time, place of accident, identity of person, and other relevant information.

Findings of Fact

Findings of fact must be as specific as possible as to times, places, persons, and events. Each fact is made a separate finding. Each fact must be supported by testimony of a witness, statement of the IO, documentary evidence, or real evidence attached to the investigative report as an enclosure. Also, each enclosure on which the fact is based must be referenced. For example, the IO may not state: "The car ran over Seaman Doe's foot," without a supporting enclosure. He or she may, however, have Doe execute a statement such as "The car ran over my foot." Include this statement as an enclosure and, in the findings of fact, state: "The car ran over Seaman Doe's foot," referencing enclosure (X). When read together, the findings of fact should tell the whole story of the incident without requiring reference back to the enclosures.

The IO may only make findings of fact that are supported by a preponderance of evidence. A preponderance is created when the evidence as a whole shows that the fact sought to be proved is more probable than not. Weight of evidence in establishing a particular fact is not to be determined by the sheer number of witnesses or volume of evidence, but depends upon the effect of the evidence in inducing belief that a particular fact is true.

In order that the acts of a deceased member may have caused harm and/or loss of life, including his or her own, through intentional acts, findings of fact relating

to those issues must be established by clear and convincing evidence. Clear and convincing means a degree of proof beyond the preponderance of evidence discussed earlier. It is proof that should (1) leave no reasonable doubt in the minds of those considering the facts and (2) create a firm belief or conviction. It is that degree of proof that is intermediate, being more than a preponderance, but not reaching the extent of certainty as beyond any reasonable doubt.

If the evidence is in any way contradictory, the IO still must make a factual determination in the findings of fact section. The following problem should make this clear.

Problem. The enclosures in an investigation reveal the following information. Mr. Doe states he had seen a vehicle speeding by him at 90 mph; he was almost hit by the car; he does not own a car, is 80 years old, and has not driven since 1945. Mr. Hatch, an off-duty police officer, states that, as the car passed him, he glanced at his speedometer and he was traveling 35 mph; he estimates the speed of the other car at 45 mph. The police report reveals that the car left only 7 feet of skid marks on dry, smooth, asphalt pavement before stopping. How should the IO record this information?

Solution. The IO should note the conflicting account in the preliminary statement as follows: "Two conflicting accounts of the speed of the vehicle in question appear in witness statements, but only encl (x), the statement of Mr. Hatch, is accepted as fact because of his experience, ability to observe, and emotional detachment from the situation." Findings of fact should reflect only the IO's evaluation of the Fact: "That the vehicle left skid marks of 7 feet in length in an attempt to avoid the collision (encl [x]); "That the skid marks were made on a dry, smooth, asphalt surface (encl [y]); and "That the speed of the vehicle was 45 mph at the time brakes were applied (encl [z])."

In some situations, it may not be necessary to show a discrepancy in the preliminary statement. In other situations, it maybe impossible to find a particular fact. If, in the opinion of the IO, the evidence does not support any particular fact, this difficulty should be properly noted in the preliminary statement as follows: "The evidence gathered in the forms of encls (x) and (y) does not support a finding of fact as to the . . . and, hence, none is expressed."

Only rarely will the conflict in evidence or the absence of it prevent the IO from making a finding of fact in a particular area. Thus, this should not be used as a way for the IO-who is either unwilling to evaluate

the facts or too lazy to gather the necessary evidence—to make the required findings of fact.

Opinions

Opinions are reasonable evaluations, inferences, or conclusions based on the facts. Each opinion must reference the findings of fact supporting it. In certain types of investigations, the CA will require the IO to make certain opinions.

Recommendations

Recommendations are proposals derived from the opinions expressed, made when directed by the CA, and may be specific or general in nature. If corrective action is recommended, the recommendation should be as specific as possible.

Disciplinary action is an area commonly addressed by the recommendations. If trial by court-martial is recommended, the IO submits a signed, sworn charge sheet as an enclosure to the investigative report. Unless specifically directed by proper authority, an IO must not notify an accused of the charges. If a punitive letter of reprimand or admonition is recommended, the IO will prepare a draft of the recommended letter and submit it with the investigative report. If a nonpunitive letter is recommended, a draft is not included in the investigation, but should be forwarded to the appropriate authority separately for issuance. If an award is recommended, the IO should draft the appropriate citation and include it as an enclosure.

Enclosures

The first enclosure is either the signed written appointing order and any modifications or the signed written confirmation of an oral or message appointing order. Include any requests for extensions of time as enclosures, in addition to letters granting or denying such requests.

JAGMAN 0229a requires the IO to properly identify all persons involved in the incident under investigation with complete name, grade or title, service or occupation, and station or residence. The list of enclosures is a suggested place for ensuring compliance with that section.

Enclosures are listed in the order referenced in the investigative report. Separately number and completely identify each enclosure. Make each statement, affidavit, transcript of testimony, photograph, map, chart, document, or other exhibit a separate enclosure. If the

IO's personal observations provide the basis for any finding of fact, a signed memorandum detailing those observations should be attached as an enclosure. Enclose a Privacy Act statement for each party or witness from whom personal information was obtained as an attachment to the individual's statement. The signature of the IO on the investigative report serves to authenticate all the enclosures.

Figure 13-5 is an example of a completed JAGMAN investigative report (without enclosures).

Classification of Report

Because of the wide circulation of JAGMAN investigative reports, classified information should be omitted unless inclusion is essential. When included, however, the investigative report is assigned the classification of the highest subject matter contained in it. Encrypted versions of messages are not included or attached to investigative reports where the content or substance of such message is divulged. To assist in the processing of requests for release of investigations and to simplify handling and storage, declassify enclosures whenever possible. If the information in question cannot be declassified, but contributes nothing to the report, consider removing the enclosure from the investigation with notification in the forwarding endorsement.

ACTION BY THE CONVENING AND REVIEWING AUTHORITIES

The IO submits the JAGMAN investigative report to the CA who reviews it and transmits it by endorsement to the appropriate superior officer. The endorsement will accomplish one of the following actions:

- Return the report for further inquiry or corrective action noting any incomplete, ambiguous, or erroneous action of the IO.
- Forward the record setting forth appropriate comments, recording approval or disapproval, in whole or in part, of the proceedings, findings, opinions, and recommendations.

In line of duty/misconduct investigation, the CA is required to specifically approve or disapprove the line of duty/misconduct opinion. This is accomplished as shown in paragraph 2 of figure 13-6.

From: Lieutenant Close D. Hatch, USNR, 111-11-1111/1105

To: Commanding Officer, U.S. Naval Support Activity, Naples, Italy

Subj: INVESTIGATION TO INQUIRE INTO THE CIRCUMSTANCES SURROUNDING THE MOTOR VEHICLE ACCIDENT INVOLVING, AND INJURIES SUSTAINED BY, YNSN JANE A. DOE, USN, 222-22-2222, NAVAL SUPPORT ACTIVITY, NAPLES, ITALY, WHICH OCCURRED IN GAETA, ITALY, ON 28 AUGUST 1994

Ref: (a) JAG Manual

Encl: (1) CO, NSA Naples, appointing order, ltr 5830 Ser 01L/1128 of 29 August 1994

(2) NSA Det Gaeta Shore Patrol Report of 28 Aug 94

(3) Statement of YNSN Jane A. Doe, USN, 222-22-2222, Naval Support Activity, Naples, Italy, of 7 Sep 94, with attached Privacy Act statement and JAGMAN § 0215b warning attached

(4) Chronological record of medical care with medical board attached

(5) NAVCOMPT 3065 (Leave Authorization) ICO SNM

PRELIMINARY STATEMENT

1. Pursuant to enclosure (1), and in accordance with reference (a), a one-officer JAGMAN investigation not requiring a hearing was conducted to inquire into the circumstances surrounding the motor vehicle accident involving and the injuries suffered by YNSN Jane A. Doe that occurred on 28 August 1994 in Gaeta, Italy. All reasonably available relevant evidence was collected. There were no difficulties encountered during the conduct of this investigation. While certain minor conflicts appear in the evidence, none was of sufficient degree or materiality to warrant comment.

2. All documentary evidence included is certified to be either the original or a copy that is a true and accurate representation of the original document represented.

3. All social security numbers were obtained from official sources and not solicited from individual service members.

4. This investigation is being conducted and this report is being prepared in contemplation of litigation and for the express purpose of assisting attorneys representing interests of the United States in this matter.

5. LCDR Mary N. Christmas, JAGC, USN, was consulted on the possibility of claims for or against the government as a result of the vehicle accident.

FINDINGS OF FACT

1. On 28 August 1994, YNSN Jane A. Doe, USN, 222-22-2222, age 21, was on authorized annual leave from U.S. Naval Support Activity, Naples, Italy, where she was assigned [encl (5)].

2. At approximately 0325, 28 August 1994, a motor vehicle accident occurred on Via Pachcria, Gaeta, Italy [encl (2)].

3. At the time of the motor vehicle accident, the vehicles involved were being driven by Antonio Franco of 39909 Via Riperia, Gaeta, Italy and Salvatore Garllino of Naples, Italy [encl (2)].

Figure 13-5.-Sample JAGMAN Investigation.

4. The vehicle driven by Mr. Franco was a 1978 Fiat 132, Naples registration NA 99999 [encl (2)].
5. The vehicle driven by Mr. Garllino was a 1992 BMW, Rome registration ROMA 12345 [encl (2)].
6. YNSN Jane A. Doe, USN, was a passenger in the vehicle driven by Mr. Garllino [encls (2) and (3)].
7. YNSN Jane A. Doe, USN, and Mr. Garllino were both wearing seat belts at the time of the accident [encls (2) and (3)].
8. Early in the evening of 27 August 1994, YNSN Doe and Mr. Garllino went to The Castle, a nightclub in Gaeta, Italy [encls (2) and (3)].
9. Over the course of several hours at The Castle, Mr. Garllino consumed approximately one and one-half bottles of Asti Spumonte champagne and YNSN Doe drank approximately one-half bottle of Asti Spumonte [encls (2) and (3)].
10. Mr. Garllino and YNSN Doe left The Castle at approximately 0310 on 28 August 1994 [encls (2) and (3)].
11. Upon leaving The Castle, Mr. Garllino drove the vehicle away from the nightclub [encl (3)].
12. Upon entering Mr. Garllino's vehicle, and "without thinking," YNSN Doe permitted Mr. Garllino to drive his vehicle [encl (3)].
13. After leaving The Castle, entering the vehicle, and driving away, Mr. Garllino proceeded up the Tangenzilla at an "excessively high speed" for the road conditions [encl (3)].
14. The posted speed limit on the Tangenzilla was 120 km [encl (2)].
15. YNSN Doe attempted to get Mr. Garllino to pull over and allow her to drive, or to at least slow down, but Mr. Garllino failed to comply with her request [encls (2) and (3)].
16. The road was covered with dew and the weather was foggy [encls (2) and (3)].
17. Mr. Garllino turned north off of the Tangenzilla onto Via Pacheria and began to slide into the southbound lane of Via Pacheria, Gaeta, Italy [encls (2) and (3)].
18. Upon going into the southbound lane of Via Pacheria, Mr. Garllino lost control of the vehicle and struck the oncoming vehicle driven by Mr. Franco [encls (2) and (3)].
19. The speed of Mr. Garllino's vehicle at the time of the accident was 80-100 km [encls (2) and (3)].
20. As a result of the collision, YNSN Doe sustained injuries to her pelvic area and right sacroiliac (lower back) and suffered a mild concussion [encl (4)].
21. Mr. Garllino and Mr. Franco reported no major injuries. Mr. Franco had only a few minor abrasions to his face [encl (2)].
22. As a result of YNSN Doe's injuries, she was transported to the Saint Benzollini Hospital, Gaeta, Italy, on 28 August 1994 [encls (2) and (3)].

Figure 13-5.-Sample JAGMAN investigation—Continued.

23. After she was stabilized, YNSN Doe was transported to the U.S. Naval Hospital, Naples, Italy, via ambulance [encls (2) and (3)].
24. On 28 August 1994, after admission to the Naval Hospital, YNSN Doe underwent surgery to remove her spleen [encl (4)].
25. YNSN Doe was hospitalized from 28 August 1994 to 8 September 1994, a period of 12 days [encl (4)].
26. The attending physician was CDR Drag A. Line, MC, USN, Naval Hospital, Naples, Italy [encl (4)].
27. YNSN Doe's prognosis is permanent disability, and no outpatient treatment is expected [encl (4)].
28. YNSN Doe is presently on limited duty attached to the Naval Support Activity, Naples, Italy, subsequent to the findings rendered by a medical board convened at Naval Hospital, Naples, Italy [encl (4)] .
29. Mr. Garllino was arrested and cited by the Gaeta Polizia for driving under the influence on 28 August 1994 [encl (2)].

OPINIONS

1. The voluntary intoxication of Mr. Garllino was the proximate cause of the accident [FOF (9), (11), (18), and (29)].
2. Excessive speed played a significant role in causing the accident [FOF (13), (14), (15), (16),(17), and (19)].
3. YNSN Doc used poor judgment in allowing Mr. Garllino to drive from The Castle, but available evidence indicated that YNSN Doc attempted to get Mr. Garllino to stop and allow her to drive—r, in the very least, to slow down-and was unsuccessful [FOF (12) and (15)].
4. YNSN Jane A. Doe's personal injuries were incurred in the line of duty and not due to her own misconduct [FOF (1), (7), (8), (11), (15), and (29)].

RECOMMENDATIONS

1. That no administrative or disciplinary action be taken against YNSN Doe.
2. That any claim submitted to the government by Mr. Franco for vehicle damage or personal injuries be forwarded to the insurance company of Mr. Garllino.

/s/ Close D. Hatch

Figure 13-5.-Sample JAGMAN investigation—Continued.

If the CA corrects, adds, or disapproves findings of fact, opinions, or recommendation, the following language would be added in the endorsement:

- The findings of fact are hereby modified as follows:
- The following additional findings of fact are added: (numbers start after the last findings of fact in the basic investigation).

- Opinion ____ in the basic correspondence is not substantiated by the findings of fact because _____ and is therefore either disapproved or modified to read as follows: _____.

The following additional opinions are added: (numbers start after the last opinion in the basic investigation).

- Recommendation ____ is not appropriate for action at this command; however, a copy of this

DEPARTMENT OF THE NAVY
COMMANDING OFFICER
U.S. NAVAL SUPPORT ACTIVITY
FPO AE 09619-1000

5830
00/Ser 1649
14 Sep 94

FIRST ENDORSEMENT on LT Close D. Hatch, USN, 111-11-1111/1105, 5800 [code] ltr of [date]

From: Commanding Officer, U.S. Naval Support Activity, Naples, Italy

To: Judge Advocate General

Via: Commander Fleet Air Mediterranean

Subj: INVESTIGATION TO INQUIRE INTO THE CIRCUMSTANCES SURROUNDING THE
MOTOR VEHICLE ACCIDENT INVOLVING, AND INJURIES SUSTAINED BY, YNSN JANE
A. DOE, USN, 222-22-2222, U.S. NAVAL SUPPORT ACTIVITY, NAPLES, ITALY, WHICH
OCCURRED IN GAETA, ITALY, ON 28 AUGUST 1994

1. Readdressed and forwarded.
2. The opinion that YNSN Doe's injuries were incurred in the line of duty and not as a result of her misconduct is approved.
3. The basic proceedings, findings of fact, opinions, and recommendations of the investigating officer are approved.

/s/ WATER E. TIGHT

copy to:
CO, NLSO Naples
LT Hatch

Figure 13-6.-First endorsement of JAGMAN investigative report.

investigation is being furnished to _____
for such action as deemed appropriate.

- Additional recommendations: (numbers start after the last recommendation in the basic investigation).

- The action recommended in recommendation ____ has been accomplished by _____ (has been forwarded to _____ for action).

If corrective action had been taken on the investigation, paragraph 4 of figure 13-6 would read:

4. Subject to the foregoing remarks, the basic proceedings, findings of fact, opinions, and

recommendations of the investigating officer are approved.

DISCIPLINARY ACTION

Whenever punitive or nonpunitive disciplinary action is contemplated or taken respecting an individual as a result of the incident under inquiry, the action will be noted in the endorsement of the CA. Disciplinary action should be taken in a timely manner and should not await the concurrence of higher authority.

COPIES AND FORWARDING

Send one complete copy of the investigation with the original for each intermediate reviewing authority

and an additional copy for JAG. In cases involving death or injury to service members, JAG receives the original and three copies. When certain types of incidents are investigated, send advance copies of the investigative report as soon as possible. Investigations requiring advance copies include the following:

- Admiralty cases
- Collisions
- Loss or stranding of a ship
- Postal losses
- Serious incidents
- Deaths/serious inquiries
- Material property damages
- Claims investigations

In all cases where it is appropriate to send an advance copy of an investigation to JAG, the advance copy will be sent by an officer exercising general court-martial jurisdiction (OEGCMJ) and will include that officer's endorsement.

RELEASING INVESTIGATIONS

Convening and reviewing authorities are not authorized to release JAGMAN investigations. The CNO (OP-09N) is the release authority for investigations involving classified information and JAG is the release authority for all other JAGMAN investigations.

The other types of administrative investigations conducted are the court of inquiry and the investigation required to conduct a hearing. As stated earlier, procedurally there are only two types. Let's look at the second type of administrative investigations now.

COURTS OF INQUIRY AND INVESTIGATIONS REQUIRED TO CONDUCT A HEARING

Other than conducting a hearing, the common thread that runs between a court of inquiry and an investigation required to conduct a hearing is the concept of parties.

PARTIES

A party is a person subject to the UCMJ who has properly been designated as such in connection with a

court of inquiry or an investigation required to conduct a hearing whose conduct is the subject of the inquiry or who has a direct interest in the inquiry. Upon request, an employee of the Department of Defense (DOD) having a direct interest in the subject of the inquiry must be designated as a party. Designation as a party affords that individual a hearing on possible adverse information concerning him or her.

A person's conduct or performance is subject to inquiry when that person is involved in the incident under investigation in such a way that disciplinary action may follow, that rights or privileges may be adversely affected, or that personal reputation or professional standing may be jeopardized.

A person has a direct interest in the subject of inquiry when (1) the findings, opinions, or recommendations may, in view of his or her relation to the incident or circumstances under investigation, reflect questionable or unsatisfactory conduct or performance of duty or (2) the findings, opinions, or recommendations may relate to a matter over which the person has a duty or a right to exercise control.

The CA of the court of inquiry or investigation required to conduct a hearing may designate parties, or the fact-finding body may be expressly authorized by the CA to designate parties.

A person designated as a party before a court of inquiry or an investigation required to conduct a hearing has the following rights:

- To be given due notice of such designation
- To be present during the proceedings, except when the investigation is cleared for deliberations
- To be represented by counsel
- To be informed of the purpose of the investigation and be provided with a copy of the appointing order
- To examine and object to the introduction of physical and documentary evidence and written statements
- To object to the testimony of witnesses and to cross-examine witnesses other than his or her own
- To request that the court of inquiry or investigation obtain documents and testimony of witnesses, or pursue additional areas of inquiry
- To introduce evidence

- To testify at his or her own request, but not be called as a witness

- To refuse to incriminate himself or herself and, if accused or suspected of an offense, to be informed of the nature of the accusation and advised that no statement regarding the offense that he or she is accused or suspected is required, and that any statement made by him or her maybe used as evidence against him or her in a trial by court-martial

- To make a voluntary statement, oral or written, sworn or unsworn, to be included in the record of proceedings

- To make an argument at the conclusion of presentation of evidence

- To be properly advised concerning the Privacy Act

- To challenge members of the court of inquiry and the IO or, when assigned, the president and any member of the investigation required to conduct a hearing for cause

Figure 13-7 illustrates the circumstances under which particular fact-finding bodies may designate parties as well as who may be designated (military and/or civilian personnel).

COURT OF INQUIRY		
<u>Designee</u>	<u>When Designated</u>	<u>Designation</u>
Any person subject to the UCMJ	Conduct or performance of duty subject to inquiry	Mandatory
Any person subject to the UCMJ or employed by DOD	Direct interests in subject of inquiry	Mandatory upon his or her request
Any member of of the USNR or USMC not subject to the UCMJ by virtue of his or her status	Conduct or performance of duty subject to inquiry	Optional upon his or her request
No other person without SECNAV (JAG) approval	_____	_____
INVESTIGATIONS REQUIRED TO CONDUCT A HEARING		
<u>Designee</u>	<u>When Designated</u>	<u>Designation</u>
Any member of the naval service subject to the UCMJ	Conduct or performance of duty subject to inquiry	Optional
Any member of any other armed force other than Navy or Marine Corps, subject to the UCMJ, DOD employees, any member of the USNR or USMC not subject by virtue of his or her status	Conduct or performance of duty subject to inquiry	Optional upon his or her request
No other person without SECNAV (JAG) approval	_____	_____

Figure 13-7.-Chart showing circumstances under which particular fact-finding bodies may designate parties.

COURT OF INQUIRY

The court of inquiry is the traditional means by which serious military incidents have been investigated. Originally adopted by the British Army, it has remained in its present form with only slight modifications since the adoption of the Articles of War of 1786. A court of inquiry is not a court in the sense of the term used today; rather, it is a board of senior officers charged with searching out, developing, assembling, analyzing, and recording all available information about the incident under investigation. When directed by the CA, the court will offer opinions and recommendations about an incident.

The court is convened by any person authorized to convene a GCM or by any person designated by the Secretary of the Navy (SECNAV). It consists of three or more commissioned officers. When practical, the senior member who is the president of the court should be a least an O-4. All members should also be senior to any person whose conduct is subject to inquiry. Legal counsel, certified under Article 27(b), UCMJ, and sworn under Article 42(a), UCMJ, appointed for the court and under the direct supervision of the president of the court assists in matters of law, presenting evidence, and in keeping and preparing the record. Counsel does not perform as a prosecutor, but must make sure all evidence is presented to the court of inquiry.

The court is convened by a written appointing order, the contents of which are much the same as those discussed for fact-finding bodies not required to conduct a hearing. The required contents, with an example, can be found in JAGINST 5830.1, end (1).

All testimony is under oath (except for a person designated as a party who makes an unsworn statement) and transcribed verbatim. Using a formal hearing procedure, witnesses and evidence are presented in the following order after opening statements are made: counsel for the court; a party; counsel for the court in rebuttal; and, subsequently as requested by the court. After testimony and statement by the parties, if any, counsel for the court and counsel for the parties may present arguments.

Although a court of inquiry uses a formal hearing procedure, it is administrative and not judicial. Therefore, as in any other administrative fact-finding body, the Military Rules of Evidence (Mil.R.Evid.) will not be followed, except for (1) 301, self-incrimination, (2) 302, mental examination, (3) 303, degrading questions, (4) 501-504, dealing with privileges, (5) 505, classified information, (6) 506, government information

other than classified information, and (7) 507, informants.

A court of inquiry has the power to subpoena witnesses who may be summoned to appear and testify before the court the same as at trial by court-martial.

INVESTIGATION REQUIRED TO CONDUCT A HEARING

The investigation required to conduct a hearing is intended to be an intermediate step between an investigation not requiring a hearing and a court of inquiry. Such investigations are used, for example, when a hearing with sworn testimony is desired or designation of parties may be required, but only a single IO is necessary to conduct the hearing.

The principal characteristics of an investigation required to conduct a hearing include the following:

- The investigation is convened by any person authorized to convene a general or special court-martial.
- It consists of one or more commissioned officers.

The investigation should normally be composed of a single officer; however, if multiple members are considered desirable, a court of inquiry should be considered. Usually, it consists of one commissioned officer, but a Department of the Navy (DON) civilian employee may be used if appropriate. The IO should be senior to any designated party and at least an O-4 or GS-13. It may consist of two or more commissioned officers with the senior member who will be the president of the board at least an O-4. If appropriate, warrant officers, senior enlisted, or DON civilian employees may be assigned as members, in addition to at least one commissioned officer. No member of the board should be junior in rank to any person whose conduct or performance of duty is subject to inquiry.

Legal counsel should be appointed for the proceedings, with duties and requirements identical to those for a court of inquiry. The investigation is convened by written appointing order. The required contents, with an example, can be found in JAGINST 5830.1, encl (2). All testimony is under oath and all proceedings are transcribed verbatim. A formal hearing procedure, similar to the court of inquiry is used. The CA may designate those persons whose conduct is subject to inquiry or who have a direct interest in the subject inquiry as parties in the convening order. The CA may authorize the fact-finding body to designate parties during the proceedings. Unless convened to

investigate a claim under Article 139, UCMJ, and JAGMAN, chapter II, an investigation does not possess the power to subpoena civilian witnesses.

USES OF THE RECORD OF INVESTIGATION

If an individual is accorded the rights of a party with respect to the act or omission under investigation, punishment may be imposed without further proceedings. The individual may, however, submit any matter in defense, extenuation, or mitigation. If an individual has not been accorded the rights of a party, a hearing conducted according to paragraph 4 of part V, *Manual for Courts-Martial* (MCM), 1984, must be conducted before punishment is imposed.

In cases where a GCM is contemplated, it is sometimes possible to use the record of a court of inquiry instead of a formal pretrial investigation of the offenses. If a court of inquiry is used in place of an Article 32, UCMJ, investigation, the accused can demand to recall witnesses for further cross-examination and to offer any new evidence on his or her own behalf. Normally, the convening of a separate Article 32, UCMJ, investigation is the most efficient method for bringing an accused to trial.

Sworn testimony contained in the record of proceedings of a court of inquiry or investigation required to conduct a hearing before which an accused was not designated as a party may not be received in evidence against the accused unless that testimony is admissible independently of the provisions of Article 50, UCMJ.

A party is entitled to a copy of the record of an Article 32, UCMJ, pretrial investigation where trial by GCM has been ordered, subject to the regulations applicable to classified material. If a letter of censure or other nonjudicial punishment (NJP) is imposed, the party upon whom it was imposed has a right to have access to a copy of the record in order to appeal.

SELECTION OF FACT-FINDING BODIES

Deciding which type of fact-finding body to convene depends upon the purpose of the inquiry, the relative seriousness of the subject under inquiry, the complexity of the factual issues involved, the time allotted for completion of the investigation, and the nature and extent of powers required to conduct the investigation. The type of fact-finding body selected is left to the judgment and discretion of the officer in

command. Before convening an investigation, the CA must consider the powers the fact-finding body will require and the desirability of designating parties. If the subject of the inquiry involves disputed issues of fact and a risk of substantial injustice if an individual is not afforded the rights of a party, a court of inquiry or an investigation required to conduct a hearing should be ordered. If the ability to subpoena witnesses is necessary, a court of inquiry should be convened.

If the subject of the investigation is a major incident, a court of inquiry should be convened. For less serious cases, an investigation not requiring a hearing will normally be adequate.

Section 0202a(3) of the JAGMAN describes a major incident as "An extraordinary incident occurring during the course of official duties resulting in (1) multiple deaths, (2) substantial property loss, or (3) substantial harm to the environment where the circumstances suggest a significant departure from the expected level of professionalism, leadership, judgment, communication, state of material readiness, or other relevant standard." These cases are often accompanied by national public/press interest and significant congressional attention, as well as having the potential of undermining public confidence in the naval service. It may be apparent when first reported that the case is a major incident, or it may emerge as additional facts become known.

Notwithstanding the fact that a death case maybe a major incident as defined, the circumstances surrounding the death or resulting media attention may warrant the convening of a court of inquiry or investigation required to conduct a hearing as the appropriate means of investigating the incident.

The first flag or general officer exercising general court-martial convening authority over the incident or in the chain of command, or any superior flag or general officer, takes immediate control over the case as the CA. If the CA determines that an incident initially considered major is not, or that a court of inquiry is not warranted under the circumstances, those conclusions must be reported to the next flag or general officer in the chain of command before any other type of investigation is convened.

Because investigating major incidents are sometimes complicated by the premature appointment of a board of inquiry or investigation required to conduct a hearing, the CA may wish to initially convene a one-officer investigation not required to conduct a hearing to immediately begin to collect and preserve

evidence and locate and interview witnesses. To decide which course of action to pursue, the CA should set a specific date for the IO to submit an interim oral report. Summaries of testimony or evidence developed by the IO may be used as an aid by any subsequent investigative body, and the initial IO maybe detailed to assist the fact-finding body.

Courts of inquiry and investigations required to conduct a hearing are only used to investigate the most serious incidents. These incidents frequently have extraordinary media and congressional interests, and considerable pressure is often exerted to complete the investigations in a limited period of time. Because of the nature of these investigations, CAs are tasked with providing support for the investigations. Personnel assigned to support these investigations are under the command of the president of the court of inquiry or the IO in an investigation requiring a hearing. The investigation becomes the primary duty of all support personnel. The following types of support will be provided when appropriate:

- Technical advisors
- Court reporters
- Interpreters
- Evidence custodians
- Security
- Administrative support personnel
- Public affairs officers
- Messages

LINE OF DUTY/MISCONDUCT DETERMINATIONS

To assist in the administration of naval personnel, the CO is required to inquire into certain cases of injury, disease, or death incurred by members of his or her command. When these inquiries are conducted, the CO is required to make what is referred to as line of duty/misconduct determinations. As in most matters, the type of inquiry and the degree of formality of the report will depend upon the circumstances of each case.

Normally, the CO of the service member involved is responsible for making the determination as to the type of, and necessity for, inquiry required. If a service member is injured and admitted to a naval hospital, the CO of the naval hospital will, if no investigation has been ordered, report the matter to the local area

coordinator or other comparable authority who will take action to cause an investigation to be conducted.

The results of the inquiry and the subsequent line of duty/misconduct determination can affect several benefits and/or rights administered by the DON to which the injured party may be entitled. Some of these rights include the following:

- Extension of enlistment
- Longevity and retirement multiplier
- Forfeiture of pay
- Disability retirement and severance pay

This report also may be made available to the Department of Veterans Affairs to assist them in making determinations concerning Veterans Administration benefits.

WHEN LINE OF DUTY/MISCONDUCT DETERMINATIONS ARE REQUIRED

Findings concerning line of duty/misconduct must be made in every case where a member of the naval service incurs a disease or injury that (1) might result in permanent disability or (2) results in the physical inability to perform duty for a period exceeding 24 hours (as distinguished from a period of hospitalization for evaluation or observation).

Opinions concerning line of duty are prohibited in death cases. Misconduct will not be attributed to a deceased member. If such an opinion has been made or recorded after the incurrance of an injury, but before death, the convening or reviewing authority will note the error and its lack of validity in the endorsement. Because federal agencies must make determinations with respect to survivor benefits, all significant and relevant facts will be recorded in a timely manner when the command is required to investigate the death of a member.

WHAT CONSTITUTES LINE OF DUTY

An injury or disease incurred by naval personnel while on active service is presumed to have been incurred in the line of duty unless there is clear and convincing evidence that it was incurred during one of the following situations:

- While absent without leave, and such absence materially interfered with the performance of required military duties. Generally speaking, absence in excess

of 24 hours constitutes a material interference unless there is evidence to establish the contrary.

- While confined under sentence of a court-martial that included an unremitted dishonorable discharge.

- While confined under sentence of a civil court following conviction of an offense that is defined as a felony by the law of the jurisdiction where convicted.

- While avoiding duty by deserting the service.

- As a result of the member's own misconduct, as defined in JAGMAN § 0218.

WHAT CONSTITUTES MISCONDUCT

An injury or disease suffered by a member of the naval service is presumed not to be the result of his or her own misconduct unless there is clear and convincing evidence that (1) the injury was intentionally incurred or (2) the inquiry was the result of grossly negligent conduct that demonstrates a reckless disregard for the foreseeable and likely consequences.

Foreseeability is defined as the reasonable anticipation of the danger created by a negligent act committed by a person of ordinary intelligence and prudence. Injury or disease from a course of conduct is foreseeable if, according to ordinary and usual experience, injury or disease is the probable result of that conduct. On the other hand, gross negligence is defined as a conscious and voluntary act, or omission, that is likely to result in grave injury of which the member is aware. It involves a willful, wanton, or reckless disregard for the life, safety, and well-being of self or others. Simple or ordinary negligence or carelessness, standing alone, does not constitute misconduct. The fact that the conduct violated a law, regulation, or order, or was engaged in while intoxicated, does not, of itself, constitute a basis for a determination of misconduct.

Misconduct can never be in the line of duty. Thus, a finding that an injury was the result of the member's own misconduct must be accompanied by a finding that the injury was incurred not in the line of duty. Accordingly, if a service member is properly performing his or her military duty and is injured as a result of that duty, a misconduct finding would be wrong since no military duty can require a service member to commit an act that would constitute misconduct.

Intoxication is a factor in many of the injuries in which misconduct is found and is often coupled with evidence of recklessness or disorderly conduct. Intoxication may be produced by alcohol, drugs, inhalation of fumes, gas, or vapor. In order for intoxication alone to be the basis for a misconduct finding, there must be a clear showing that the following three elements existed:

1. The member's physical or mental faculties were impaired due to intoxication at the time of the injury.

2. The extent of such impairment.

3. The impairment was the proximate cause of the injury.

Proximate cause is conduct that, in a natural and continuous sequence unbroken by any efficient intervening cause, produces injury, and without which the result would have not occurred.

Careful attention must be paid to the facts of each case, especially when the blood alcohol content (BAC) of the injured member is above that constituting a legal state of intoxication in the particular jurisdiction (normally between 0.08 and 0.10 percent BAC). A showing of a blood alcohol level of above .10 mg/dl will, in many cases, be sufficient to satisfy the first two elements; however, additional evidence should be sought in determining whether or not there existed any physical impairment that directly contributed to the injury of the service member. The investigation should include a description of the service member's general appearance, along with information regarding whether the member staggered or otherwise displayed a lack of coordination, was belligerent or incoherent, or displayed slow reflexes or slurred speech.

Inability to perform duty resulting from a disease that is directly attributable to a specific, prior, proximate, and related intemperate use of alcohol or habit-forming drugs is the result of misconduct and therefore, not in the line of duty.

If a member unreasonably refuses to submit to medical, surgical, or dental treatment, any disability that proximately results from such refusal will be deemed to have been incurred as a result of the member's own misconduct.

Any disability resulting from venereal disease is the result of misconduct if the member has not complied with the regulations that require reporting and receiving treatment for such disease.

A member may not be held responsible for his or her acts and their foreseeable consequences if, as the result of a mental defect, disease, or derangement, he or she was unable to comprehend the nature of such acts or to control his or her actions. In the absence of evidence to the contrary, it is presumed that all persons are mentally responsible for their acts.

Because of the strong instinct for self-preservation, an unsuccessful, but bona fide, attempt to kill oneself creates a strong inference of lack of mental responsibility. In all cases of attempted suicide, evidence bearing on the mental condition of the injured person must be obtained. This includes all available evidence as to social background, actions, and moods immediately before the attempt, any troubles that might have motivated the incident, and any pertinent examination or counseling session.

Self-inflicted injury not prompted by a serious intent to die is, at most, a suicide gesture and such injury, unless lack of mental responsibility is otherwise shown, is deemed to be incurred as a result of the member's own misconduct. The mere act alone does not raise a question of mental responsibility because there is no intent to take one's own life; the intent was to achieve some secondary gain.

RELATIONSHIP BETWEEN MISCONDUCT AND LINE OF DUTY

There are only three possible determinations for findings in a line of duty/misconduct determination. They include the following:

1. In line of duty, not due to member's own misconduct.

2. Not in line of duty, not due to member's own misconduct. This determination would occur when misconduct is not involved, but an injury or disease is contracted by a service member that falls within one of four other exceptions to the line of duty presumption (desertion; unauthorized absence (UA); confinement as a result of civilian conviction; or confinement pursuant to sentence by a GCM that included an unremitted dishonorable discharge). Example: A service member has been UA for 8 months and is injured while lawfully crossing a street. The injuries were not the result of negligence.

3. Not in line of duty, due to member's own misconduct. A determination of misconduct always requires a determination of not in the line of duty.

An adverse determination as to misconduct or line of duty is not a punitive measure. Disciplinary action, if warranted, is taken independently of any such determination. A favorable determination as to line of duty/misconduct does not prevent separate disciplinary action, nor is such a finding binding on any issue of guilt or innocence in any disciplinary proceeding. The loss of rights or benefits resulting from an adverse determination may be relevant and, at the request of the accused, admissible as a matter in extenuation and mitigation in a disciplinary proceeding.

RECORDING LINE OF DUTY/MISCONDUCT DETERMINATIONS

The inquiry into, and findings concerning, injuries or disease can be recorded in one of three ways.

1. Health and dental record entries. Use health and dental records when the member's physical inability to perform duty exceeds 24 hours and the medical representative and CO agree that the injury or disease is not likely to result in permanent disability and was incurred in the line of duty and not as a result of the member's own misconduct.

2. Form reports. Use an injury report form (NAVJAG Form 5800.15) when all the following conditions are met:

- a. In the opinion of the medical representative, as concurred by the CO, the injury or disease was incurred in the line of duty and not as a result of the member's own misconduct.

- b. In the opinion of the medical officer, a permanent or permanent partial disability will likely result.

- c. A fact-finding body is not required under the *JAG Manual* and is not otherwise contemplated.

In any case, even if a health and dental record entry would suffice, a form report maybe made to JAG if there appears to be any reason for maintaining a record in that office, Send the form report to JAG via a GCM CA for review. Never use a form report when an injury is self-inflicted, either intentionally or accidentally, since a finding of misconduct often results in either case.

3. A fact-finding body must be convened, and the CO must make findings concerning misconduct and line of duty in any case that:

- the injury was incurred under circumstances that suggest a finding of misconduct might result.

- the injury was incurred under circumstances that suggest a finding of not in line of duty might result.

- there is a reasonable chance of permanent disability, and the CO considers the appointment of a fact-finding body the appropriate means to make sure an adequate official record is made concerning the circumstances surrounding the incident.

- the injured party is a member of the Naval or Marine Corps Reserve, and the CO determines an investigation to be the appropriate means for recording the circumstances.

ACTION BY REVIEWING AUTHORITIES

The CA must specifically comment on the line of duty/misconduct opinion and take one of the following actions:

- The CA must approve, disapprove, or modify the opinion expressed by the fact-finding body by simply stating his or her conclusion in the endorsement.

- If, upon review of the report or record, the CA believes the injury or disease was incurred not in line of duty and due to the member's own misconduct, the member may be afforded an opportunity to submit any desired information.

If provided the opportunity to submit additional information, the member will be advised that (1) no statement against his or her interest relating to the origin, incurrence, or aggravation of any disease or injury suffered need be made and (2) if the member is suspected of having committed an offense, he or she will be advised of his or her Article 31, UCMJ, rights. If the member elects not to provide further information, that election will be set forth in the reviewing authority's endorsement.

The CA should make sure appropriate time lost, enlistment extension, and similar entries are made in service and/or medical records before sending the report of investigation of an injury concluded to have been incurred not in the line of duty. In the event the not in the line of duty opinion is later disapproved by the OEGCMJ, corrective entries can be made at that time.

FORWARDING

Unless the CA is empowered to convene GCMs, send the record or report to an OEGCMJ. This officer may take any action on the report that could have been taken by the CA. With respect to conclusions

concerning misconduct and line of duty, he or she will indicate his or her approval, disapproval, or modification of such conclusion unless he or she returns the record for further inquiry. A copy of this action will be sent to the CO of the member concerned so that appropriate entries may be made in the service and medical records. Reviewing authorities subsequent to the OEGCMJ need neither comment nor record approval or disapproval of the prior actions concerning line of duty and misconduct.

INVESTIGATIVE REQUIREMENTS FOR SPECIFIC INCIDENTS

The IO should be aware of particular problem areas in line of duty/misconduct investigations. Examples of situations commonly encountered are listed in the following paragraphs, along with a listing of various facts that should be included in investigative reports. The examples are not intended to be comprehensive, nor do the listed factors purport to cover every fact situation that may arise.

Speeding

It is impossible to state categorically when excessive speed becomes gross negligence and requires a finding of misconduct. The investigative report should contain information about the type and condition of the road; the number and width of the lanes; the type of area (densely populated or rural); any hills or curves that played a part in the accident; the traffic conditions; the time of day and weather conditions; the posted speed limit in the area; the mechanical condition of the car (particularly the brakes and tires); and the prior driving experience of the member. The speed of the vehicle is also important; however, estimates of speed based solely upon physical evidence at the scene of the crash, such as skid marks and damage to the vehicle, are somewhat conjectural unless corroborated by other evidence. Therefore, attempts should be made to secure estimates of speed from witnesses, passengers, and drivers. In this way, the postaccident estimates of the police may be corroborated.

Falling Asleep at the Wheel

Falling asleep at the wheel is one of the most common causes of accidents, but is one of the most difficult situations in which to establish misconduct. The act of falling asleep, in itself, does not constitute gross negligence; however, the act of driving while in a condition of such extreme fatigue or drowsiness that the

driver must have been aware of the danger of falling asleep at the wheel may amount to such a reckless disregard of the consequences as to warrant a finding of gross negligence and misconduct. Before a finding of misconduct can be made, there must be clear and convincing evidence showing that the service member experienced premonitory symptoms of drowsiness that should have put the driver on notice of the imminent danger of falling asleep. This information should include how long the service member had been driving and how many miles the member had driven before the accident; the amount of sleep the member had before starting the trip; the member's activities for the 24 hours before the injury; whether any momentary periods of drowsiness were experienced before finally falling asleep; and any evidence of drinking or intoxication.

Passenger Misconduct

If a passenger knows or should know that the driver is unlikely to drive safely because of negligence, lack of sleep, recklessness, or intoxication, the passenger is guilty of misconduct upon voluntarily exposing himself or herself to the danger. The investigation should contain information showing whether the service member had an opportunity to leave the vehicle after the driver's condition became apparent; whether the driver and passenger had been drinking together and how much each had to drink; and what action, if any, was taken by the passenger to have the driver drive more carefully. Also determine the operator's driving experience; any signs of intoxication; whether the passenger noticed the driver was tired or exhibited any other symptoms; whether the passenger took any action to have the driver rest or to personally assume the driving responsibilities.

Disorderly Conduct and Fighting

Injuries incurred by a service member while voluntarily and wrongfully engaged in a fight or similar encounter, whether or not weapons were involved, are due to misconduct where they might reasonably have been expected to result directly from the fight and the service member is at least equally culpable with the adversary in starting or continuing the affair.

Not all injuries resulting from fighting necessarily must be determined to have resulted from the member's misconduct. For example, if an adversary employs unexpectedly violent methods or means, such as a dangerous weapon, a conclusion that the resulting injuries were not due to the member's own misconduct could be appropriate.

In investigating such incidents, you should determine (1) who instigated or provoked the fight and/or struck the first blow; (2) any history of prior altercations between the participants; (3) whether either participant was armed; (4) whether either participant attempted to terminate the fight; (5) the relative size and capabilities of the participants; and (6) the part that drinking, if any, played in the altercation. If there are inconsistent statements from witnesses about the incident, the IO should indicate in the report which witnesses the officer chose to believe in making the findings of fact and opinions.

Intentionally Self-Inflicted Injuries

Include any medical reports and opinions in the investigative report when the investigation concerns an intentionally self-inflicted injury. In these cases, the IO should primarily look for evidence, or lack thereof, of a bona fide suicide intent. The investigative report should contain information about the following:

- Whether the methods used to cause injury were likely to cause death under the circumstances
- The service member's expressed reasons for attempting suicide
- Whether the service member took action to avoid being found before the injury as opposed to being certain he or she would be discovered and treated quickly
- Whether the service member had threatened suicide before the incident under investigation
- Statements of shipmates and friends about the member's apparent state of mind on the date of the act

Accidentally Self-Inflicted Injuries: Gunshot Wounds

A form report should not be used when an injury results from an accidental self-inflicted gunshot wound because of the strict, high standard of care required in the use of firearms or other dangerous weapons. In cases of this kind, mere failure to take proper precautions to prevent a casualty normally constitutes simple negligence or carelessness and, therefore, does not justify a finding of misconduct. However, in the event the record clearly and convincingly shows that the service member has displayed a lack of care that amounts to gross negligence, taking into account the higher standard of care required of persons using and

handling dangerous weapons, a finding of misconduct is appropriate. The IO's report should include information about the following:

- Whether the subject member was familiar with guns in general and with the gun in question
- Whether the member was aware of the weapon's safety features
- Whether there were any defects in the weapon and whether the member knew of such defects
- Whether the member knew the gun was loaded or had checked the chamber for its possible loaded condition
- Whether the member had cocked the weapon
- How the weapon was positioned in relation to the service member's body and why it was placed in that position

- The possible cause of the weapon's discharge
- The mental attitude of the handler, including any alcohol or drug involvement
- Any intervening factors

SUMMARY

Your knowledge of the proper procedures involved with the conduct and preparation of the various types of JAGMAN investigations is an important aspect of your duties as a senior LN. Additional information concerning these investigations can be found in chapter II of the *Manual of the Judge Advocate General* and JAGINST 5890.1. Whenever you are involved with working on a JAGMAN investigation, you should take the time to review the applicable sections of the JAGMAN and JAGINST 5890.1 to make sure all procedures and any special requirements are followed.